# Supreme Court of the United States,

OCTOBER TERM, 1905.

**No. 199.**

ANTONIO JOSÉ AMADEO, FOR THE USE OF AND TOGETHER WITH THE PASTOR MARQUEZ COMPANY, IN LIQUIDATION, Plaintiffs in Error,

vs.

THE NORTHERN ASSURANCE COMPANY, Defendant in Error.

**IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.**

## BRIEF FOR PLAINTIFFS IN ERROR.

### Statement.

This is a writ of error to the District Court of the United States for the District of Porto Rico.

On April 21, 1903, Antonio José Amadeo, one of the plaintiffs in error, filed his declaration, alleging

that he was a citizen of Porto Rico; that on December 21, 1884, the defendant in error, The Northern Assurance Company, an English corporation, delivered to him a policy of fire insurance on certain property belonging to him, to wit, two ranchos (farm buildings) and a cooperage, for the sum of three thousand one hundred pesos (approximately $3,100), from December 21, 1884, to December 21, 1885 (Rec., pp. 1, 2); and that on February 7, 1885, said property was destroyed by fire, the damage being to the amount of the sum insured (Rec., p. 4).

The declaration further averred that all the conditions of proper notice and inventory had been complied with, and that no conditions which might defeat recovery existed; and that the plaintiff had made a demand for the amount, but that the defendant had not paid and refused to pay. Damages were laid at $10,000 (Rec., p. 4).

The summons having been properly issued (Rec., p. 5) and served on the general agents, in Porto Rico, of the defendant (Rec., p. 6), the defendant demurred to the declaration (Rec., p. 6, bottom) on the following grounds:

"FIRST.—For the reason that it does not state a cause of action.

"SECOND.—Because upon the face thereof, and by the admissions of the plaintiff contained therein, it appears that the said alleged cause of action is prescribed and barred by the Statute of Limitations and the period of prescription as provided in the civil and commercial codes."

Issue having been joined on the demurrer (Rec., p. 7, top), the demurrer was argued and overruled, and defendant was permitted to plead (Rec., p. 7).

Thereupon the defendant filed its plea (Rec., p. 7), which contained among others, the following allegations:

"SECOND.—For a second and further plea to the said declaration, defendant says that plaintiff ought not to have and recover herein for the reason that the alleged cause of action did not accrue within fifteen years before this suit, and of this it puts itself upon the country.

"THIRD.—For a third and further plea to the said declaration defendant says that plaintiff ought not to have and recover herein for the reason that plaintiff has no interest in the proceeds of the policy sued on, nor did he have at the time of the institution of this suit, the said policy and the proceeds thereof having been transferred, sold and assigned by him by notarial document May 2, 1885, to the firm of Pastor Marquez & Company, who are the only persons entitled to sue herein, and this defendants are ready to verify."

After having demurred to the allegations just cited on the ground that they "are not sufficient in law to bar him from having the aforesaid action," and having joined issue on the remaining allegations (Rec., p. 10) the plaintiff, by leave of Court, amended the declaration as follows (May 18, 1903) (Rec., p. 12):

"In the title of the case after the name of the plaintiff add the following words: 'for the use of and together with Pastor Marquez Company in liquidation.'

"In the body of the declaration add at the end of it the following paragraph:

"'And plaintiff avers that about the month of August, 1885, the said policy was assigned to the Pastor Marquez Company, which is a company in liquidation and of which Pedro Salazar is liquidator.'"

The demurrer to the second plea (Statute of Limitations) was thereupon overruled (Rec., p. 13, bot-

tom), plaintiffs duly excepting, and the plaintiffs filed a replication to such plea (Rec., p. 14), as follows:

"And as to the second plea of the defendant above pleaded, the plaintiffs say that the same limitation and prescription therein pleaded was interrupted extra-judicially," etc.

To this replication the defendant demurred (Rec., p. 14), and the demurrer was sustained by the Court, plaintiffs duly excepting (Rec., p. 15). The plaintiffs declining to plead further, judgment was rendered against them (Rec., p. 15).

Thereupon this writ of error was sued out by the plaintiffs.

## Summary.

In other words, the Court below held that a suit brought on April 21, 1903, upon a cause of action arising out of a contract of fire insurance on, or soon after February 7, 1885 (slightly more than eighteen years having elapsed since the fire), was barred by prescription, holding that the legal period of prescription is fifteen years. It also held that this period of prescription could not have been interrupted extra-judicially, that is to say, by extra-judicial demand.

## JURISDICTION.

The defendant below being a foreign corporation, and the amount in dispute exceeding $1,000, the Court below had jurisdiction.

By the act establishing the government of Porto Rico (Foraker Act, 31 Stat. at L., Chap. 191, Sec. 34, Apr. 12, 1900), it was provided that "Porto Rico shall constitute a judicial district, to be called the District of Porto Rico, * * * The District Court for said district shall be called the District Court of the United States for Porto Rico * * * and shall have in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the Circuit Court of the United States, and shall proceed therein in the same manner as a Circuit Court."

By the Act of March 2, 1901 (31 Stat. at L., Ch. 812, Sec. 3), the foregoing act was amended, it being provided that "the jurisdiction of the District Court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the Act of April 12, 1900, extend to and embrace controversies where the parties or either of them are citizens of the United States or citizens or subjects of a foreign state or states wherein the matter in dispute exceeds exclusive of interest or costs the sum or value of $1,000."

This Court has jurisdiction in the case. In Royal Insurance Company *vs.* Martin, 192 U. S., 149, 161, it was held that this Court has jurisdiction in appeals and writs of error coming from Porto Rico "in every case, without regard to the sum or value in dispute, where the Constitution of the United States or a treaty thereof or an act of Congress is brought in question and the right claimed thereunder is denied, *and in every other case where the sum or value in dispute exceeds $5,000, exclusive of costs.*" As the amount involved is $10,000, the jurisdiction of the Court is clear.

## Assignment of Errors.

The assignment of errors is found on page 16 of the printed record, and is in the following words:

> "1. The overruling by the Court of the demurrer of the plaintiffs to the second plea of defendant to the declaration.
> "2. Sustaining the demurrer of the defendants to the replication of the plaintiffs to the said second plea.
> "3. That the Court erred in rendering judgment for the defendant and against the plaintiffs upon the pleadings in said cause, and that said judgment is contrary to the law and the facts as stated in the pleadings in said cause."

Under these assignments plaintiff in error proposes to prove the following points, the validity of either of which must lead to a setting aside of the judgment of the Court below:

1. The period of prescription on an action on a policy of fire insurance accruing in 1885 is twenty years.

2. The period of prescription may be interrupted by extra judicial demand.

## POINT I.

### The period of prescription on an action on a policy of fire insurance, accruing in 1885, is twenty years.

This point has been fully considered by this Court in its decision in the case of *Royal Insurance Company* vs. *Miller*, 199 U. S., 353. In that case the policy of insurance was in favor of Antonio Amadeo,

one of the present plaintiffs in error, the fire occurred on February 6, 1885, suit was brought April 23, 1902, and a co-plaintiff, Lucas Amadeo, was added by leave of Court on May 13, 1903. In the case at bar the fire occurred on February 7, 1885 (it is understood by counsel that this was the same conflagration, occurring in the midnight hours between February 6 and 7, 1885), the suit was brought on April 21, 1903, one year later, and the co-plaintiff was added on May 18, 1903, five days later, than in the former case.

The following extract from pages 365 to 368 of the decision of this Court, in that case, applies, with the exceptions stated in the last paragraph, the name of the co-plaintiff, and the admission by the defendant-in-error, as to the nature of the action, word for word to the case at bar. That the action is a "personal action" is clear, falling as it does, under the definition of "accion personal" given by *Alcubilla* in his *Diccionario de la Administracion Española*, Madrid, 1886, Vol. I., page 124:

> "It is that which may be brought against the same person who, because of a contract or an act has obligated himself to give or to do or not to do something; or against the heirs of such person."

It is also clear that the decision of this Court in that case would apply if the contract were construed to be a "commercial contract," subject to the provisions of the Code of Commerce, for Article 943 of that code provides as follows:

> "The actions which by virtue of this code do not have a fixed period in which to be brought judicially, shall be governed by the provisions of the common law."

*Royal Insurance Company* vs. *Miller*, 199 U. S., 353, 365 to 368:

> "FIFTH.—The fire occurred on February 6, 1885. Suit was brought on April 23, 1902,

and Lucas Amadeo was made a party plaintiff on May 13, 1903. In other words, even although the cause of action on the policy only arose within a reasonable time after the making of proofs of loss more than 15 years elapsed between the arising of the cause of action and the bringing of this suit. Both parties at bar admit that the action on the policy was personal in its nature, and barred by the term of prescription governing actions of that character.

"As we have seen, the defendant (plaintiff in error here) specially pleaded and relied upon the prescription of fifteen years. The applicability of that prescription is based upon Article 1964 of the Civil Code, which provides: 'A mortgage action prescribes after twenty years, and those which are personal and for which no special plan of prescription is fixed, after fifteen years."

"As both parties concede that there was no special term of prescription fixed by the Civil Code for an action upon an insurance policy, it follows that the right to sue on the policy was barred by the limitation in question, if that limitation applied. The defendants in error—the plaintiffs below—deny its applicability, and insist that the term of prescription was twenty years, and, moreover, insist that, even if the fifteen-year term applied, the action was not barred, because of interruptions of the prescription asserted to result from the proof as to alleged demands and acknowledgments. The trial Judge, whilst rejecting the claim of the plaintiffs as to the twenty-year prescription, and maintaining that of the defendant as to the fifteen-year prescription, yet held the action not barred, because of the interruptive effect which the Court considered arose from certain demands or acknowledgments, which it was deemed were established by the proof. Before coming to consider the alleged errors on this subject we must determine whether the time of prescription was fifteen years, as asserted by the defendant and held by the trial Court, or twenty years as contended by the plaintiffs.

"The loss under the policy occurred in 1885, and the right of action arose, therefore, in

that year. The Civil Code was not then applicable to Porto Rico, not having been extended to that island by royal decree until 1889, and the claim that the twenty-year prescription is the only controlling period is based upon that fact. Whilst it is conceded that by the terms of the Civil Code personal actions were barred by fifteen years, the argument is that by the Code actions which arose prior to its promulgation were to be controlled by the prior law, which, it is insisted, was twenty years. The provision of the Code relied upon to maintain this proposition is Article 1939, which reads as follows:

"'ARTICLE 1939. Prescription, which began to run before the publication of this code, shall be governed by the prior laws; but if, after this code became operative, all the time required in the same for prescription has elapsed, it shall be effectual, even if, according to said prior laws, a longer period of time may be required.'

"As the fifteen years fixed by the code for the bringing of personal actions had not elapsed between the promulgation of the code and the bringing of this action, it follows that the controversy was not within the terms of the proviso, and therefore the limitation of the cause of action is to be determined, not by the code provision fixing fifteen years, but by the prior law. What was the term of prescription of personal actions under the prior law is, therefore, the question.

"In the absence of express legislation concerning Porto Rico, what was the prior law applicable to that island concerning the limitations of personal actions, must be fixed by ascertaining the period of prescription for personal actions generally prevailing under the Spanish law. Schmidt, Civil Law of Spain and Mexico, p. 35. Whilst the general Spanish law, prior to the promulgation of the civil code, is to be derived from a review of the successive Spanish codes, nevertheless the Spanish law prevailing prior to the code is primarily to be found in the code known as the Novisima Recopilaçion.

"By Law 5, Title VIII., Book 11, of the Novisima Recopilaçion, it appears that the term of prescription of personal actions was twenty years (White, New Recopilaçion, Vol. 1, p. 96). And from an edition of the Spanish codes, with concordance and notes, published at Madrid in 1850, under the text of the Novisima Recopilaçion in question (Vol. 9, p. 458), it appears that the limitation of twenty years as to personal actions, as expressed in the text of the Recopilaçion, prevailed as early as 1348, in the code known as the Ordenamiento de Alcalá.

"Moreover, the Supreme Court of Spain has held, in repeated decisions, that the provision found in the Novisima Recopilaçion, above alluded to, was the general law of Spain on the subject, in force prior to the adoption of the civil code, and that by that law the limitation of personal actions was twenty years. References to a Spanish publication, in which many such decisions are reported, are given in the margin.*

"It follows that the court below erred in applying the fifteen-year period of prescription, and that as twenty years had not elapsed from the time the cause of action arose to the bringing of the suit on the policy, the right to sue was not barred by limitation."

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* Decisions of the Supreme Court of Spain, sitting at Madrid, reported in the Jurisprudencia Civil, holding the period of prescription of twenty years applicable to personal actions: Sentence of January 21, 1863, Vol. 8, p. 54, No. 20; Sentence of March 17, 1865, Vol. 11, p. 326, No. 92; Sentence of April 8, 1865, Vol. 11, p. 469, No. 139; Sentence of June 4, 1886, Vol. 60, p. 24. No. 7*a*; and Sentence of October 3, 1892, Vol. 72, p. 142, No. 40 of the last mentioned Sentence. See also Sentence of March 24, 1892, Vol. 71, p. 307 (after the enactment of the code); Sentence of March 9, 1865, Vol. 14, p. 264, No. 75; Sentence of May 12, 1874, Vol. 30, p. 56, No. 181; Sentence of April 1, 1884, Vol. 54, p. 548, No. 137; Sentence of March 12, 1888, Vol. 61, p. 404, No. 89, and Sentence of April 19, 1901, Vol. 91, p. 556, No. 105.

It follows, as a matter of necessity, that the plaintiffs below should never have been placed in a position in which they were compelled to plead an interruption of the statute, and that, therefore, the judgment of the Court below should be set aside with instructions to sustain plaintiff's demurrer (Rec., p. 10) to the second plea (Rec., p. 7).

*Bauserman* v. *Blunt, 147 U. S., 647, 652, 661.*

## POINT II.

## The period of prescription may be interrupted by extrajudicial demand.

Under the Civil Code, Art. 1973—

> "Prescription of actions is interrupted by their institution before the court by *extrajudicial claim* (*reclamacion extrajudicial*) *of the creditor*, and by any act of acknowledgment of the debt by the debtor."

(See Civil Code in Force in Cuba, Porto Rico, and the Philippines, U. S. War Department Translation, Washington, 1899). This Code was in force from 1889, (Royal Decree, p. 3, War Dept. Transl.), having been continued in force by Section 7 of the Foraker Act, Chap. 191, Laws of 1900; 31 Stat. at L., pp. 77–79, which provided

> "That the Laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable," &c.

The Civil Code of Porto Rico, passed in 1902, superseded this code, but it reenacted the law relative to the interruption of actions in exactly the same words, in Section 1874.

The Commercial Code in Article 943 provides as follows:

> "The actions which by virtue of this code do not have a fixed period in which to be brought judicially, shall be governed by the provisions of the common law."

As there is no special provision for prescription of actions on fire insurance contracts in the Commercial Code, the present case is governed by the ordinary rules of prescription of the "common law" as embodied in the Civil Code.

(See War Department Translation, Code of Commerce, 1889, p. 5 n. 1; Code went into effect May 1, 1886. It was continued in force by Section 7 of the Foraker Act above cited.)

*Escriche*, in his "*Diccionario Razonado de Legislacion y Jurisprudencia*," Paris, 1852, defines a demand "*reclamacion*" (p. 1416), as follows (translated):

> "The opposition or contradiction, either oral or written, against some thing as unjust or showing no consent to the same; and the *reclaiming*, or the recovery *or demand* which one who holds title to a thing makes against him who has possession of the same or retains it."

Under the Code, therefore, a demand is sufficient to interrupt the running of the prescription.

See also, the laws of *Las Siete Partidas*, Partida 3, Title 29, Law 29, translated as follows by Lislet & Carlton in "*Laws of Las Siete Partidas*," New Orleans, 1820:

> "Likewise we say, that if a man owe another anything which he was bound to give him, and the creditor remained so long with-

> out demanding it, that the other began to acquire the debt by prescription; if then the debtor renew the obligation, by executing an act or giving security or a pledge for it; or by paying something by way of damages, or as a part of the debt; or by doing anything else of a similar nature, after he had begun to prescribe for it; the prescription will be thereby interrupted and the time lost during which it had to run. *And so we say it would be, if the creditor demand the debt, in the presence of friends or of arbitrators.*"

The *Fuero Real*, a code in force to-day where not superseded by provisions of the modern codes (*Alcubilla, Diccionario de la Administracion Española*, Madrid, 1886, Vol. 2, p. 543, "Article" Codigo), in Book 2, Title II., law 7, provides as follows:

> "We establish that a person in or out of the country wishing to interrupt loss by prescription, may demand before the King his right, thing, or summon by a certain signature that he may answer, or by a letter of the Mayor, *or through his friend*, as the law demands."

In other words, the prescription of actions may be interrupted by extra-judicial claim, that is to say, by a formal demand made upon the debtor.

On this point see the following decisions of the Supreme Court of Spain, sitting at Madrid, contained in the series of reports entitled "Jurisprudencia Civil":

Sentence of July 14, 1871, Vol. 24, No. 282, pp. 369, 381.

Sentence of February 12, 1875, Vol. 31, No. 71, pp. 322, 326.

Sentence of January 12, 1893, Vol. 73, No. 10, pp. 45, 49.

Sentence of February 23, 1893, Vol. 73, No. 56, pp. 284, 287.

These decisions are unanimous in holding that the prescription of a personal action may by interrupted by "extra-judicial claim."

The replication, to the effect that the prescription "was interrupted extra-judicially" was, therefore, good in law.

## Conclusion.

The Court below should be ordered to set aside the judgment, and to sustain plaintiffs' demurrer to the second plea of the defendant; or, should this Court hold such demurrer to have been well taken, the Court below should be ordered to set aside the judgment, and to deny defendant's demurrer to plaintiffs' replication to the second plea.

Respectfully submitted,

CHARLES M. BOERMAN,
FRITZ V. BRIESEN,
Of Counsel for Plaintiffs in Error.

NEW YORK, March 2, 1906.

# Supreme Court of the United States,

OCTOBER TERM, 1905.

**No. 200.**

ANTONIO JOSÉ AMADEO, FOR THE USE OF AND TOGETHER WITH THE PASTOR MARQUEZ COMPANY, IN LIQUIDATION,
Plaintiffs in Error,

vs.

THE ROYAL INSURANCE COMPANY,
Defendant in Error.

**IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.**

## BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

### Statement.

The facts and pleadings in this case are so similar to those in Case No. 199 that a decision in that case must necessarily apply to the present case. The cases in their main features are practically identical.

The plaintiffs in error are the same as those in Case No. 199. The defendant is an English corporation (Rec., p. 1).

The amount involved is $24,000, the case below being a consolidation of two suits between the

same parties, one for $9,000 and one for $15,000 (Rec., pp. 1, 26).

The declarations were filed on April 21, 1903 (Rec., p. 1), the co-plaintiff was added on May 18, 1903 (Rec., pp. 23, 24).

The policy in the first suit was dated December 21, 1884 (Rec., p. 1), and in the second suit September 15, 1884 (Rec., p. 7).

The fire took place on February 7, 1885 (Rec., pp. 6, 11).

The pleas raising the defense of prescription will be found on pages 17 and 19 of the printed record; plaintiffs' demurrers to such pleas on pages 20 and 21; the record of the overruling of the demurrers on page 26; plaintiffs' replication on page 27; defendant's demurrer thereto on page 27; and the record of the sustaining of the demurrer and judgment on pages 28 and 29.

Whatever action the Court may deem proper to take in case No. 199 will necessarily be the proper action in the present case.

Respectfully submitted,

CHARLES M. BOERMAN,
FRITZ V. BRIESEN,
Of Counsel for Plaintiffs in Error.

NEW YORK, March 2, 1906.

# Supreme Court of the United States,

OCTOBER TERM, 1905.

**No. 201.**

FEDERICO AMADEO, FOR THE USE OF AND JOINTLY WITH THE PASTOR MARQUEZ COMPANY, IN LIQUIDATION,
Plaintiffs in Error,

vs.

THE ROYAL INSURANCE COMPANY,
Defendant in Error.

**IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.**

## BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

### Statement.

The facts and pleadings in this case are so similar to those in case No. 199 that a decision in that case must necessarily apply to the present case. The cases in their main features are practically identical.

The plaintiff in error, Federico Amadeo, is a citizen of Porto Rico. The defendant is an English corporation (Rec., p. 1).

The amount involved is $40,000, the case below being a consolidation of two suits, between the same parties, one for $10,000 and one for $30,000 (Rec., pp. 1, 27).

The declarations were filed on April 21, 1903 (Rec., p. 1); the co-plaintiff was added May 18, 1903 (Rec., p. 24).

The policy in the first suit was dated February 29, 1884 (Rec., p. 1), and in the second suit July 26, 1884, (Rec., p. 7). The first policy was issued to the mercantile society styled "Amadeo Hermanos," but was assigned to the plaintiff Amadeo, with assent of the defendant, on January 19, 1885 (Rec., p. 6).

The fire took place on February 7, 1885 (Rec., pp. 6, 12).

The pleas raising the defense of prescription will be found on pages 17 and 19 of the Record; plaintiffs' demurrers to such pleas on pages 21 and 22; the record of the overruling of the demurrers on page 27; plaintiffs' replication to the second plea on pages 27-28; defendant's demurrer thereto on page 28; and the record of the sustaining of the demurrer, and of judgment, on pages 28 and 29.

Whatever action the Court may deem it proper to take in Case No. 199 will necessarily be the proper action in the present case.

Respectfully submitted,

CHARLES M. BOERMAN,
FRITZ v. BRIESEN,
Of Counsel for Plaintiffs in Error.

NEW YORK, March 2, 1906.

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IN THE

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ANTONIO JOSÉ AMADEO, FOR THE USE OF AND TOGETHER WITH THE PASTOR MARQUEZ COMPANY, IN LIQUIDATION,

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*Plaintiffs in Error,*

*vs.*

THE ROYAL INSURANCE COMPANY.

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In Error to the District Court of the United States for the District of Porto Rico.

## SUPPLEMENTAL BRIEF ON BEHALF OF THE SURVIVING PLAINTIFF IN ERROR.

Information was received this morning (March 6, 1906) by the New York counsel for plaintiffs in error, that the counsel for the defendants in error in the above two cases have suggested upon the record the death of the plaintiff, Antonio José Amadeo.

This supplemental brief is intended to show that Rule 15 of the Supreme Court does not apply to these cases.

*Antonio José Amandeo is only a nominal plaintiff. He, or his estate, has no further pecuniary interest in this litigation. This is a fact admitted upon the record by both sides.*

The original plaintiff in these cases was Antonio José Amadeo (No. 199, Rec., p. 1; No. 200, Rec., pp. 1, 7). In each case the defendant pleaded that Amadeo had no interest in the suit. In case No. 199 (Rec., p. 8), plea 3d sets forth that Amadeo "has no interest in the proceeds of the policy sued on, nor did he have at the time of the institution of this suit, the said policy and the proceeds thereof having been transferred, sold and assigned by him by notarial document May 2, 1885, to the firm of Pastor Marquez Company, who are the only persons entitled to sue herein."

In case No. 200, the defendant (Rec., pp. 17, 19), filed a plea (3d) alleging that the "plaintiff has no interest in the proceeds of the policy sued on, nor did he have at the time of the institution of this suit, the said policy and proceeds thereof having been transferred, sold and assigned by him by notarial document on ———, 1885."

Thereupon the plaintiff, by leave of court (and without objection on the part of the defendants), amended his declarations (Case No. 199, Rec., p. 12; Case No. 200, Rec., p. 24), by adding to the title of the case "for the use of and together with Pastor Marquez Company, in liquidation," and amended his declaration by adding at the end of it the following paragraph:

"And plaintiff avers that on or about August, 1885, the said policy was assigned to the Pastor Marquez Company, which is a company in liquidation and of which Pedro Salazar is liquidator."

The pleadings, above outlined, show plainly that, in Porto Rico, not only a chose in action may be assigned, but that also the real party in interest is a necessary party to the suit. That this is the case is also shown by the following authorities:

*Moyle, Contract of Sale in the Civil Law*, Oxford, 1892, p. 37:

"The effect of the sale of the right of action is that it operates as an assignment, entitling the assignee to sue, either by direct action in the name of the assignor, or in his own name by *actio utils*."

*Institutions of the Civil Law in Spain, Asso. & Manual*, Tr. by Johnston, London, 1825, p. 95:

"A right is either in the thing or to the thing * * * a right to the thing is that which belongs to any as against another person to oblige him to give, to do, or not to do something * * * of the second kind or of species of obligations which arise from contract."

Same, p. 96:

"The first species of right in the thing is that of dominion, which is a power that arises from the right in the thing, by reason of which he may dispose of and derive from it every possible advantage, may exclude others from its use, and claim it from any possessor, unless a contract, or the law, hinders it."

Same, p. 209:

"2d. That things not corporeal may be the object of this contract (sale); *ex gr.* rights, actions, etc."

See also Chapter 7, "Assignments of Credits and Other Incorporeal Rights," p. 199, etc. Civil Code in force in Cuba, Porto Rico and the Philippines, War Dept. Tr., 1899, and particularly the following Articles thereof:

"Art. 1526. The assignment of a credit, right or action shall produce no effect against a third person, but from the time the date is considered fixed, in accordance with Arts. 1218 and 1227."

"Art. 1528. The sale or assignment of a credit includes that of all the accessory rights, such as the security, mortgage, pledge or privilege."

It having been admitted, as already explained, by both sides, that a transfer was made by a notarial document we need not go into the particular manner in which credits may be assigned.

*Escriche,* in his *Diccionario Razonado de Legislacion y Jurisprudencia,* Paris, 1852 (p. 49), defines "accion" as follows:

(Translated): "The right to demand a certain thing and the legal method by which we seek under the law that which is ours or that which is owing to us.

"* * * The action understood in its first sense, that is, as a right which belongs to us to demand something, may be considered movable or immovable according to its subject-matter, although it is neither the one nor the other by nature. It is movable if it pertains to the demand of a movable thing, or immovable if it pertains to the demand of an immovable or real thing."

"Credito" is defined (p. 522) as

"a debt which some one holds in his favor."

A chose in action relating to a demand for a sum of money under a fire insurance contract, or a right to demand payment in case of loss, is therefore personal or movable property, which "is the object of commerce," and falls therefore, under Art. 1864 of the Civil Code. This code, while not in effect at the date of the transaction, may be considered as being declaratory of the common law in force at that time:

> "Art. 1864. All personal property which is the object of commerce may be given as a pledge, provided it be capable of being possessed."

A chose in action, following, as it does, the person of the owner, is always capable of *"being possessed"* by the owner.

As already explained, Antonio José Amadeo is only a nominal party to the suit. He admits this himself in amendment to the complaint. Defendants have admitted it. As explained, therefore, the Pastor Marquez Company is the real party in interest, and under the Spanish law, holds a legal title. No prejudice can, therefore, arise to the defendants by the consideration by the court of the writs of error in these two cases at this time. Nothing would be gained by having the personal representative of Amadeo intervene, and much delay in the possible trial of the cases may be avoided.

Rule 15 of the Supreme Court provides that the proper representatives of the deceased party may or must intervene "whenever, pending a writ of error or appeal in this court, *either party* shall die." The rule does not state that intervention is necessary when "any one of the parties may die," and it is believed to be the spirit of the rule that *only when a real party in interest* dies, his personal representative must intervene. If this be its spirit, it would be in consonance with the general rule of the law on this subject and with

former decisions of the court. See, for instance, *"Encyc., Pleading and Practice,"* Vol. 5, p. 815, Tit. "Death:"

> "It has been uniformly held that the death of the nominal plaintiff in an action at law does not abate the action. The action proceeds in the name of the real party in interest, and need not be revived in the name of the representatives of the deceased."

*Cyc. of Law and Proceedure,* Vol. 2, p. 771:

> "The death of one of several appellants or plaintiffs in error does not abate a suit, nor necessitate a revival of it in the Appellate Court. The cause survives to, and may be prosecuted by, the other plaintiffs in error."

*McKinney vs. Carroll,* 12 Pt., 66, 71:

> "On consideration of the suggestion and motion made by Mr. Jones of counsel, for the plaintiffs in error, in this cause, on a prior day of the present term of this court, to wit: on Thursday, the 11th day of January, it is the opinion of this court that it is unnecessary to make the heirs and representatives of John McKinney, whose death has been suggested on the record, parties to this writ of error; as the cause of action survives to the two other plaintiffs in error."

*Moses vs. Wooster,* 115 U. S., 285, 288:

> "Here, however, there is no need of a revivor that substantial justice may be done. The decree below was against all the defendants jointly, upon a joint cause of action. It affected all alike, and the interest of the decedent is in no way separate or distinct from the others."

*Campbell vs. Strong,* Hempst., Sec. 265, F. C., No. 2367a:

"The suit ought not to have abated upon the suggestion of the death of James Miller, who was then acting governor of the territory, for he was only a nominal party upon the record, and his name might have been stricken out without injury, and that of the governor alone written who, in legal contemplation, is always in being."

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This proceedure is the one adopted by the most enlightened jurisdictions. It is the practice adopted by the courts of the State of New York (See *Palmer vs. Davis*, 28 N. Y., 242). It is also the practice of the English Courts, Dicey on Parties to Actions, Am. Ed., p. 526:

"*Misjoiner.*—Where an action is brought by A and B, which should be brought by A alone, judgment may be given in favor of such one (or more) of them as are entitled to recover."

*Bremner vs. Hull*, L. R., 1 C. P., 748.

See also *Perry vs. Mechanics' Mutual Ins. Co.*, 11 F. R., 478, 482, in which it was held that, because of the liberal provisions of the Code of Rhode Island, "the court may order any party improperly joined in any action to be stricken out."

While these cases are based upon the codes or practice acts of the States in which the causes of action respectively arose, nevertheless they show that it is to-day deemed no more than just that any party improperly joined be stricken out in order not to put his co-plaintiffs or co-defendants to the unnecessary trouble of another trial.

It is distinctly provided by R. S., 701, that

"The Supreme Court may affirm, *modify*, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes, lawfully brought before it for re-

view, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the inferior court, *as the justice of the case may require.* * * *"

It may be said that should the court hold that Amadeo should never have been a party in this case, the proper course for the court to pursue would be to order the judgment set aside, with directions to strike out the name of Amadeo.

If, therefore, Amadeo was a proper party, he was not a necessary party, and his representatives need not intervene. If he was an unnecessary party, the court below may be ordered to strike his name from the title of the suit, leaving only the Pastor Marquez Company, the real party in interest.

Respectfully submitted,

FRITZ V. BRIESEN,

*Of Counsel for Plaintiffs in Error.*

New York, March 6, 1906.